

IN THE MATTER OF GREAT SOUTHERN MANAGERS AUSTRALIA LIMITED (ACN 083 825 405) (IN LIQUIDATION)

GREAT SOUTHERN MANAGERS AUSTRALIA LIMITED (ACN 083 825 405) (IN LIQUIDATION) IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE MANAGED INVESTMENT SCHEMES LISTED IN SCHEDULE 1 TO THE INTERLOCUTORY APPLICATION

First Plaintiff

GREAT SOUTHERN OLIVES COMPANY LIMITED (ACN 121 381 208) (IN LIQUIDATION)

Second Plaintiff

GREAT SOUTHERN OLIVE HOLDINGS PTY LIMITED (ACN 111 092 374) (IN LIQUIDATION)

Third Plaintiff

ANDREW JOHN SAKER

Fourth Plaintiff

MARTIN BRUCE JONES

Fifth Plaintiff

DARREN GORDON WEAVER

Sixth Plaintiff

JAMES HENRY STEWART

Seventh Plaintiff

JAMES THACKRAY

First Defendant

TONY MCGRATH

Second Defendant

COLIN NICOL

Third Defendant

THE GROWERS LISTED IN SCHEDULE 8 OF THE APPLICATION

Fourth Defendants

REVISED OUTLINE OF SUBMISSIONS FOR 29 APRIL 2010 HEARING

Date of Document: 19 April 2010
Date of Filing: 19 April 2010
Filed on behalf of: The plaintiffs

Prepared by
Middletons
Level 2
6 Kings Park Road
WEST PERTH WA 6005

Tel: (08) 9216 0900
Fax: (08) 9216 0901
Ref: JMH:20090355.352083
james.healy@middletons.com

CIRCUMSTANCES OF THE GREAT SOUTHERN OLIVE SCHEMES

1. The fourth to seventh plaintiffs (**Liquidators**) were appointed joint and several voluntary administrators of the first to third plaintiffs (GSMAL, GSOC and GSOH) on 16 May 2009: **Saker affidavit ¶ 25; AJS-14: p194.**

2. GSMAL was the responsible entity amongst others of those managed investment schemes registered under Chapter 5C of the Corporation Act 2001 (Cth) (**Act**) listed in Schedule 1 of the application (**Schemes**) and for the cultivation of olives: **Saker affidavit ¶¶ 6 and 7**. Under the Schemes, participants in those schemes (**Growers**) subscribed to sublease and participate in respect of one or more parcels of land, each of 0.1 Ha, known as “grovelots” in which the cultivation of the olives took place: **Saker affidavit ¶ 12**.
3. GSOC and GSOH own the land in WA and NSW on which the olives are planted (**Olive Properties**): **Saker affidavit ¶ 8**. The land was leased to GSMAL under certain head leases (**Head Leases**): **Saker affidavit ¶ 10 AJS-5: p64 and AJS-6: pp65-94**. The Growers were granted their interests in the grovelots by certain subleases and by the constitutions for each of the Schemes, which are identified by the year of planting and whether the olives are cultivated organically, conventionally or a mixture of the two (“diversified”): **Saker affidavit ¶¶ 9 to 13**.
4. On 18 May 2009, Simon Read, James Thackray, Tony McGrath and Colin Nicol of McGrath Nicol (**Receivers and Managers**) were appointed by a syndicate of secured lenders as the receivers and managers of the assets and undertakings of GSMAL. During the currency of their appointment the Receivers and Managers were effectively in control of the assets and undertakings of GSMAL: **Saker affidavit ¶ 27**.
5. Since shortly after the commencement of the voluntary administration of GSMAL, GSOC, and GSOH the Liquidators, in conjunction with the Receivers and Managers, sought to develop a strategy for the orderly recapitalisation or realisation of the Schemes. Growers were invited to contribute funds towards the maintenance of the olive groves. However, no funding from Growers was forthcoming: **Saker affidavit ¶¶ 37 and 39; AJS 22: p332, 23: p348**.
6. Expressions of interest were sought for an entity to replace GSMAL as the responsible entity for the Schemes. On 24 September 2009, the Receivers and Managers concluded that a replacement responsible entity could not be found for the Schemes: **Saker affidavit ¶¶ 37 and 38; AJS 22-23: pp332-349**.
7. On 19 November 2009, the creditors of each of GSMAL, GSOC, GSOH, resolved that each be wound up and that the Liquidators be appointed as joint and several liquidators, as they have to date remained: **Saker affidavit ¶ 28; AJS-17: p215, 19: p315, 20: p321 and 21: p327**.

8. On 11 December 2009, the Receivers and Managers issued winding up notices to the Growers of each Olive Scheme under section 601NC of the Act, providing in that in accordance the Constitution of each Scheme and section 601NC of the Act, each Scheme was proposed to be wound up because the purpose of the Schemes could no longer be accomplished, GSMAL had no funding to operate any Scheme and no replacement responsible entity for the Schemes could be identified: **Saker affidavit ¶ 31; AJS-22: pp332-347.**
9. Growers were then entitled under Division 1 of Part 2G.4 of the Act to call a meeting of members to consider the proposed winding up on the Schemes but none did. After 28 days without any such meeting, the Receivers and Managers became entitled to wind up the Schemes. However, no such winding up has yet occurred: **Saker affidavit ¶¶ 32-34.**
10. On 25 February 2010, GSMAL received notices from GSOC and GSOH specifying certain defaults under the Head Leases, including failure to pay rent, obtain insurance and maintain the olives, and providing 1 month for the defaults to be remedied, failing which the Head Leases would be terminated: **Saker affidavit ¶ 56; AJS-33: pp411-413.**
11. The Receivers and Managers did not respond to the notices: they have previously conceded, and a finding of fact has been made that, GSMAL lacks the resources to remedy certain defaults under the Head Leases: **Saker affidavit ¶ 31 to 32; AJS 22 to 23: pp332, 348.**
12. On 26 February 2010 the Receivers and Managers gave notice of their intention to relinquish control of GSMAL: **Saker affidavit ¶ 35; AJS-24: p350.** On 2 March 2010, they gave notice that they had relinquished control of the office and business of the Responsible Entity of the Schemes and of related rights, effectively returning the control of the Schemes to the Liquidators: **Saker affidavit ¶ 36 and AJS-25: p352.**
13. Each of GSMAL, GSOC, GSOH is, and has since at least the appointment of the Liquidators as administrators on 16 May 2009 been, hopelessly insolvent: **Saker affidavit ¶ 25; AJS-13 and 14: pp191, 194.**

PROPOSED SALE OF OLIVE PROPERTIES

14. The Liquidators conducted a process to identify the highest and best price for the Olive Properties: **Saker affidavit ¶¶ 37-40.** The best price obtained was to

purchase the Olive Properties on an unencumbered basis: **Saker affidavit ¶¶ 40-41; AJS 39, 40, 41 and 42: ppC5, C9, C12 and C74.**

15. The Liquidators seek approval from the Court under section 511 of the Act, to cause (i) GSOC and GSOH to terminate the Head Leases, (ii) GSMAL to wind up the Schemes, and (iii) GSMAL to grant vacant possession of the Olive Properties to GSOC and GSOH respectively, on the grounds that the defaults are incapable of cure and the Olive Properties cannot be maintained: **Saker affidavit ¶¶ 46-57.**
16. The termination of the Head Leases and the Schemes will bring to an end the interests of the Growers in the Olive Properties. Those processes, if successfully completed, have as their goal the sale of the Olive Properties free and clear of encumbrances: **Saker affidavit ¶¶ 9 to 15; AJS 4, 5, 6 and 7: pp18, 64, 65 and 95.**
17. The Liquidators seek to sell the Olive Properties free and clear of encumbrances to certain purchasers, Kailis Organic Olive Groves Limited ACN 095 927 969 (**Kailis**) and Sumich EVOO Australia Pty Limited ACN 003 829 919 (**Sumich**), with whom they entered MOUs, for the benefit of the creditors of GSOH and GSOC: **Saker affidavit ¶¶ 42 and 24; AJS-40: pC9 and AJS-39: pC5.**
18. Since the execution of the MOUs the Liquidators have negotiated, and entered, asset sale agreements with Kailis and Sumich (**Asset Sale Agreements**), which are conditional upon Court approval.

ECONOMIC CONSEQUENCES IF SALE NOT EFFECTED

19. In the absence of prompt further action:
 - (a) GSMAL will continue to default on the Head Leases;
 - (b) there is no reasonable prospect of those defaults being retrospectively cured or prospectively avoided;
 - (c) those defaults are causative of past, and will likely cause future, diminution in the value of the Olive Properties;
 - (d) there is no reasonable prospect that funding will be available from GSOC, GSOH or any other party to care for and maintain the Olive Properties; and

- (e) in the absence of such care and maintenance, the Olive Properties will deteriorate further, with adverse consequences for their future harvests and, consequently, future value.
20. The Liquidators have identified and entered into agreement for the sale of the Olive Properties on terms which they consider to be the most favourable available. There is no reason to believe that those terms will improve in the future. There are good reasons to expect that, if the Asset Sale Agreements are not now completed, the value of the Olive Properties will diminish and any possible future terms will be less valuable.
21. Unsurprisingly, the requirement of the purchasers is that they acquire the Olive Properties free and clear of all liens, claims and encumbrances. That requirement, and the sale of the Olive Properties, cannot be satisfied or effected, properly or at all, in the absence of the relief sought.
22. Consequently, the Liquidators make this application for relief to effect the Asset Sale Agreements, as they sought earlier relief in order to effect an urgent and necessary harvest of the olive fruit.

PROCEDURAL HISTORY

23. This proceeding was commenced by originating process filed on 10 March 2010. On 16 March 2010, Master Sanderson made orders under section 511 of the Act directing and authorising the Liquidators to incur certain expenditure to conduct the 2010 olive harvest of the Olive Properties.
24. By the interlocutory process filed on 7 April 2010 the Liquidators sought (as anticipated, in the originating process filed 10 March 2010 and the submissions filed on 11 March 2010):
- (a) to join the Growers as defendants to this proceeding;
 - (b) leave to effect substituted service upon the growers;
 - (c) directions that they are justified in terminating and bringing to a conclusion the Head Leases;
 - (d) to wind up the Schemes;
 - (e) declarations that the assets to be sold, including the Olive Properties, are free and clear of claims, liens and encumbrances;
 - (f) approving the sale of the Olive Properties and certain associated plant;
 - (g) orders as to the priority of payment of proceeds from those sales; and
 - (h) certain associated relief.

25. On 8 April 2010, Acting Master Chapman made orders granting leave to join the Receivers and Managers and Growers as defendants, permitting substituted service of the proceedings against the Growers, and for certain other procedural matters.

STATUTORY AUTHORITY UNDER WHICH THE PRESENT APPLICATION IS MADE

Section 477(2B)

26. The Liquidators seek the relief sought pursuant to ss. 477(2B) and 511 of the Corporations Act 2001 (Cth) (**Act**).
27. The Liquidators seek the Court's approval of the Asset Sale Agreements under section 477(2B) of the Act, which requires approval of any agreement which imposes (or may impose) obligations upon a company in liquidation exceeding 3 months. The Asset Sale Agreements may have that result and, accordingly, leave is sought.
28. Creditor-appointed liquidators (including those who became appointed following their appointment as administrators) have sought and obtained authorisation pursuant to section 477(2B) of the Act: *In Re Timbercorp Securities Limited (No 4)* [2009] VSC 530 at [10].
29. The Court can grant orders under section 477(2B) of the Act where:
- (a) the transaction is in the interests of the company, the creditors and the community: *Carob Industries Pty Ltd (in liq) (t/as Foremost Equipment) v Simto Pty Ltd trading as Simto Australia* [1999] WASC 258 at [14]; and
 - (b) the transaction is the proper realisation of the assets of the company or otherwise assists in the winding up of the company: *Warne v GDK Financial Solutions Pty Ltd* [2006] NSWSC 464; (2006) 233 ALR 181 at [58] per Austin J.
30. If, in relation to the approval of a contract with more than three month's duration (not being a litigation funding agreement) where the subject matter of the agreement is purely commercial, the court will usually respect the liquidators' commercial judgment in favour of the proposal, and will generally not interfere (and therefore will grant approval) in the absence of evidence of bad faith, error of law or principle, or some real or substantive ground for doubting the prudence of the proposal: *State Bank of New South Wales v Turner Corp Ltd* (1994) 14

ACSR 480 at 483 per Tamberlin J; *Re Spedley Securities Ltd (in liq)* (1992) 9 ACSR 83 at 85, per Giles J; *Corporate Affairs Commission v ASC Timber Pty Ltd* (1998) 29 ACSR 109 at 118.

31. Here, the entry into the Asset Sale Agreements is to the benefit of each of GSOC and GSOH which (i) realise value from their principal assets which will, absent sale, perish or waste, (ii) prevent the need to incur further expenditure in relation to the Olive Properties, and (iii) create a pool of funds which may permit a distribution to be made to their creditors.

Section 511

32. The Liquidators seek directions under section 511 of the Act in order to confirm that their conduct, particularly in the case of multiple companies which may not have identical interests, is appropriate.
33. The directions are first sought to approve the termination of the Head Leases and the Schemes.
34. The Liquidators seek declarations and determinations under s. 511 in order to bind the other interested parties, comprising the Receivers and Managers and the Growers, to the recognition that there are no claims, liens or encumbrances held by those persons (which would, if false, be inconsistent with the relevant provisions of the Asset Sale Agreements) permitting the Olive Properties will be sold free and clear of liens, claims and encumbrances. That Court's recognition will satisfy the requirement of the purchasers, and thereby benefit the vendors GSOC and GSOH and, thereby, their creditors.
35. The relief sought is the recognition of what the Liquidators submit will be the case obtaining after the termination of the Head Leases and the Schemes: the Growers will have no interests in the Olive Properties.
36. The application has the collateral benefit that if, notwithstanding the investigations by the Liquidators and the application of the legal principles concerning leases and managed investment schemes, a Grower asserts an interest in Olive Properties, that claim can be adjudicated. If it is meritorious, the sale may be abandoned. However, the Liquidators are cautious to ensure that they do not make undertakings to the purchasers which they cannot meet, and that they give an opportunity for any Grower to identify a claim, before the Asset Sale Agreements become binding or are completed.

37. The Court's powers under section 511 of the Act have been characterised as being declaratory in nature: RS French, 'Declarations: Homer Simpson's Remedy – Is there anything they cannot do?' in Dharmananda and Papamatheos, *Perspectives on Declaratory Relief* (2009) at 32.
38. The Liquidators submit that a declaration as to ultimate rights is available under section 511 of the Act: *ASC v Melbourne Asset Management Nominees Pty Ltd* (1994) 49 FCR 334; (1994) 121 ALR 626 (Northrop J); *Meadow Springs Fairway Resort Ltd v Balanced Securities Ltd* [2007] FCA 1443; (2007) 25 ACLC 1443 (French J) (each holding that section 511 provided power to make such orders), so long as the interested parties are joined to the proceedings and given an opportunity to be heard.
39. There are cases which have held that provisions for directions to be given to liquidators or other persons in control of external administration may not permit determinations of substantive rights: *Re GB Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674 at 680; (1991) 9 ACLC 1291; *JW Murphy and PC Allen* (1996) 19 ACSR 569 at 570; *Re Anglican Insurance Ltd* [2008] NSWSC 41 at [38]-[39]; (2008) 26 ACLC 147; *Re Graf Holdings Pty Ltd* [1999] NSWSC 217 at [33], [39], [41].
40. Those cases may be distinguished on the grounds that, first, section 511 is cast in different terms to the other sections which permit directions to be given, namely, s. 479(3) (Court appointed liquidators) and s.424(1) (controller of property of a corporation). Those provisions speak of the external administrator seeking "directions". Section 511 provides for an application permitting the Court to "determine any question arising in the winding up of a company": s.511(1)(a). The language is broad and unqualified and distinguishable from the other sections and s.511 suited conveying a mere right to seek approval. Secondly, it is said that there is "no reason why binding orders cannot be made where the parties affected have been given the opportunity to be heard": *Melbourne Asset Management Nominees* at 352, cited with approval by French J in *Meadow Springs Fairway Resort Ltd* at [49] to [50].
41. It is submitted that the present circumstances are appropriate for the exercise of the Court's power under s.511 to make binding orders, and that the persons affected have been given an opportunity to be heard.

TERMINATION OF HEAD LEASES

Events of default & relief against forfeiture

42. The Head Leases were, and are, in continuing default.
43. In compliance with the terms of the Head Leases, appropriately specific notices of default have been delivered to the lessee (GSMAL). At the time the notices were delivered GSMAL was under the control of the Receivers and Managers.
44. The defaults have continued and the past defaults have not been cured. No attempt has been made to cure the defaults whether by GSMAL under the control of the receivers and managers, GSMAL under the control of the liquidators or by any other person. There is no prospect of the past or present defaults being cured.
45. In circumstances where there is no reasonable prospect of the defaults being cured retrospectively or prospectively, equity should not intervene to afford relief from forfeiture: *Chandless-Chandless v Nicholson* [1942] 2 KB 321 at 323; [1942] 2 All ER 315; *Greek Macedonia Club Ltd v Pan Macedonian Greek Brotherhood NSW Ltd* [2007] NSWSC 92 at [77]. Relief against forfeiture is not as of right: *Pioneer Quarries (Sydney) Pty Ltd v Permanent Trustee Co of NSW Ltd* (1970) 2 BPR 9562 at 9572. It is submitted that no such intervention is warranted in the present circumstances.
46. Consequently, the Liquidators' proposal to terminate the Head Leases should be endorsed by a direction from the Court.

Consequences if defaults are not cured

47. If the defaults are not cured and the Head Leases are not terminated, the Olive Properties will incur expenses and suffer defaults which (i) the tenant GSMAL cannot satisfy or cure, (ii) the landlords GSOC and GSOH cannot satisfy or cure, (iii) the landlords and their Liquidators have no proper interest in satisfying or curing under a long term lease the benefit of which enures to the Growers, and (iv) if not made, will incur substantial risks for the landlords and their Liquidators (one default comprises a failure to prepare firebreaks).
48. Absent termination, the Liquidators cannot sell the Olive Properties under the current Asset Sale Agreement. There is no basis to conclude that, with the Head Leases in place, the Liquidators could sell the Olive Properties at all. In that circumstance, the choices available to the Liquidators must include

disclaiming the property. Even if that election were to be made, it is not clear that would benefit the Growers who, absent significant fresh capital investment, will be unable to extract any value from the Olive Properties in the medium term, or at all.

Position of Growers

49. The consequence of the termination of the Head Leases will be to terminate the Subleases granted to the Growers: *Weller v Spiers* (1872) 26 L.T. 868; *Warner v Sampson* [1958] 1 QB 404; [1958] 1 All ER 314.
50. There are no circumstances apparent which would warrant the invocation of section 81(4) of the *Property Law Act 1969 (WA)*. Any such relief is exercised sparingly: *Creery v Summersell & Flowerdew & Co Ltd* [1949] Ch 751 at 767 per Harm J. It has been held not to be available when the subtenant is unwilling to subscribe to a covenant to repair upon which the head tenant has defaulted: *Hill v Griffin* (1987) 282 ER 85 (CA) at 86 per Slade LJ.
51. Consequently, after termination and re-entry by GSOC and GSOH respectively, the Growers will have no interest remaining under the subleases.

Liquidators' possible conflict of interest

52. At the time of the issuance of the default notices, the Liquidators were appointed to each of GSMAL, GSOC and GSOH, but were not in effective control of GSMAL because of the intervening appointment of the Receivers and Managers. Since that date, the Receivers and Managers have retired from the assets and undertakings of GSMAL as responsible entity of the Schemes, including the Head Leases from GSOC and GSOH.
53. Consequently, the Liquidators are now in control of both the landlord and the lessee, whose interests are not necessarily the same.
54. The Liquidators have, accordingly, sought directions before terminating the Head Leases. The Liquidators submit, in GSMAL's actual circumstances of a complete inability to cure any breach, a "real sensible possibility of conflict" does not arise: *Queensland Mines Ltd v Hudson* (1978) 18 ALR 1 (PC); *Boulting v Association of Cinematograph, Television & Allied Technicians* [1963] 2 QB 606 at 637–8; [1963] 1 All ER 716; *Chan v Zacharia* (1984) 154 CLR 178; 53 ALR 417 at CLR 205; *Ultra Tune Australia Pty Ltd v McCann and Anor* (1999) 30 ACSR 651 at [76] to [79].

55. However, the prudent and proper course is to seek directions, on notice to interested parties, as the Liquidators have done. The other choice available, the appointment of a special purpose liquidator, would not serve any purpose other than to incur fees at the expense of creditors (or, in the case of assetless GSMAL, without funds at all) where the fundamental and insurmountable problem is the insolvency of GSMAL (and of GSOC and GSOH).

WINDING UP OF THE SCHEMES

56. The Receivers and Managers issued Scheme winding up notices and no meeting of Growers was convened with the result that the Liquidators are now entitled, under the Scheme constitutions and s.601NC of the Act, to terminate the Schemes.
57. The Liquidators have sought approval to take that course or, alternatively, sought an order that the Court wind up the Schemes.
58. Upon the winding up of the Schemes (together with the termination of the Head Leases), the Liquidators seek certain declarations and determinations as to effect of termination of head leases and the status of liens

Status of liens and claims

59. In the absence of any claim by GSMAL or any Grower, there can be no lien against the Olive Properties by any of them by those persons. The Liquidators submit that the declarations sought will recognise the actual existing interests of those parties, and afford the comfort to the purchasers under the Asset Sale Agreements which is necessary under those agreements to effect a sale.

APPROVAL OF SALE OF OLIVE PROPERTIES

60. The Liquidators seek directions and approvals to effect the sale of the Olive Properties and associated assets.

APPLICATION OF SALE PROCEEDS FOR OLIVE PRODUCE

61. The Liquidators seek directions and approvals to apply the proceeds from the 2010 Olive Harvest, having regard to the expenses properly incurred by the Liquidators (and any such expenses incurred by the Receivers and Managers)

to which a lien will accrue under the principle in *Re Universal Distributing Co Ltd (in liq)* [1933] HCA 2; (1933) 48 CLR 171 at 173-4.¹

APPLICATION OF PROCEEDS OF ASSET SALE AGREEMENTS

62. The Liquidators seek directions and approvals to apply the proceeds from the Asset Sale Agreements, having regard to the expenses properly incurred by the Liquidators (and any such expenses incurred by the Receivers and Managers) to which a lien will accrue under the principle in *Re Universal Distributing Co Ltd (in liq)* [1933] HCA 2; (1933) 48 CLR 171 at 173-4.

COSTS

63. The Liquidators seek their costs of this application against the estates to which they are appointed.

R W Douglas

19 April 2010

¹ In circumstances where the liquidator has employed his time and energies in creating a fund, he will ordinarily be entitled to an equitable lien on the fund to discharge so much of the reasonable cost of the remuneration fixed for work done in the winding up as is referable to the creation of the fund.